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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. [redacted] 40

WILLIAM JOE JOHNSON, *Petitioner*,

vs.

HARRY S. AVERY, Commissioner,
Department of Corrections
and
LAKE RUSSELL, Warden, Tennessee State Penitentiary,
Nashville, Tennessee, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Petitioner challenges the constitutionality of a Tennessee state prison regulation forbidding inmates to assist one another in the preparation of legal documents. The California Director of Corrections has a similar regulation, which is in force in all institutions under his control. This regulation is currently the subject of attack in several pending federal court actions. We believe the Ten-

nessee regulation involved in the instant case to be constitutional in all respects, and will so argue herein. We also believe that the California regulation, on the basis of distinguishing factors not apparent from its face, is valid irrespective of the validity of the Tennessee regulation.

Specifically, petitioner contends that a general prohibition of prisoner assistance of other prisoners in the preparation of legal documents is invalid unless the state provides appointed counsel to aid in the preparation of their pleadings all prisoners desiring to prosecute legal actions relating to their incarceration. In addition to contending that under no circumstances does such a prohibition on prisoner assistance violate any federal constitutional or statutory right of prisoners, we wish to point out that Califorina provides an alternative to prisoner assistance not considered by petitioner, which meets all constitutional objections to the Tennessee regulation which petitioner advances.

Our interest in presenting the California procedure to this Court at this time is to avoid an unnecessarily broad holding in the instant case. Should this Court reject the position of respondents, which we fully support, we respectfully request that this Court consider the California practice which, we submit, fully protects the constitutional rights of the indigent prisoner to bring his claims before the courts. By so doing, this Court could avoid confronting state and federal correctional administrators with an intolerable choice—sanctioning "jailhouse lawyers" or furnishing each prisoner with an attorney to act as his personal legal advisor. Our interest in preserving the

California procedure as a reasonable alternative to these two impermissible choices brings The People of the State of California before this Honorable Court as *amicus curiae*.

SUMMARY OF ARGUMENT

Petitioner claims that the Habeas Corpus Act, specifically, 28 U.S.C. § 2242, confers a statutory right on prisoners to receive assistance in the preparation of habeas corpus petitions addressed to federal courts and a concomitant right on other prisoners to render such assistance. This claim is utterly devoid of merit. The plain meaning of 28 U.S.C. § 2242 is merely that a habeas corpus petition shall not be considered defective merely because it is signed and verified by someone other than the person seeking release. This conclusion is reinforced by an examination of the legislative history of the 1948 amendment to the section. It would be wholly unreasonable to construe the section as conferring a federally protected right to prepare a habeas corpus petition in violation of an otherwise valid state regulation.

Also without merit is petitioner's claim that the regulation in question abridges his constitutional right of access to the courts. Under existing law, the right of access to the courts includes only the right to communicate freely with courts and judges. Since the regulation attacked does not impair this right, it is valid.

Petitioner apparently seeks to have this Court broaden the scope of the right of access to the courts, to include the right to receive assistance in the preparation of plead-

ings from either a "jailhouse lawyer" or an attorney. Should this Court consider such an extension of the right, we submit that such consideration should involve a balancing of state and individual interests. The state has an overriding interest in prohibiting the activities of "jailhouse lawyers." These activities result in two manifest evils: they pose disciplinary problems so serious as to imperil the lives of inmate "clients," and they demonstrably encourage the filing of fraudulent habeas corpus petitions and other legal pleadings, to the direct detriment of the courts and society in general, and to the indirect detriment of the same inmate "clients." The prisoner's interest in receiving such assistance is, by contrast, minimal, as prisoners are, by and large, able to prepare and present satisfactorily their own habeas corpus petitions. There are, however, two classes of prisoners to whom the foregoing does not apply: those who are unable to write, and those who, while literate, are ignorant of how to frame a habeas corpus petition. Under the California practice, however, such inmates have no need of assistance from other prisoners. The state and federal courts in California have, by court rule, prescribed detailed forms to be filled in by persons seeking writs of habeas corpus. These forms are designed to elicit, through probing questions, all facts necessary to a determination of whether a writ of habeas corpus should issue. Mimeographed copies of these forms are made available to all California state prisoners without charge. The Rules of the Director of Corrections provide that staff members shall provide all necessary assistance in filling out the forms to those unable to do so.

It is our position that the California practice of providing all prisoners with judicially approved habeas corpus forms and all necessary assistance in filling them out provides a reasonable and therefore constitutionally acceptable alternative to the demonstrably pernicious institution of the "jailhouse lawyer." Therefore, should this Court find any constitutional infirmity in the Tennessee regulation herein under attack, we submit that such infirmity could be removed by adoption of a practice similar to that of California.

ARGUMENT

I

28 U.S.C. § 2242 CREATES NO FEDERALLY-PROTECTED RIGHT IN AN INDIVIDUAL, OTHER THAN THE PERSON FOR WHOM RELIEF IS SOUGHT, TO PREPARE HABEAS CORPUS PETITIONS IN VIOLATION OF AN OTHERWISE VALID STATE REGULATION

Petitioner relies upon 28 U.S.C. § 2242, which provides, in relevant part:

> "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

The last seven words were added by a 1948 amendment. 62 Stat. 965. Petitioner claims that this section, as so amended, creates a federally protected right in a state prisoner to receive assistance from fellow prisoners in the preparation of habeas corpus petitions addressed to federal courts and a concomitant right in other prisoners to render such assistance. This contention is so obviously

wrong that it deserves even a brief reply only because it was accepted by the District Court.

The section in question is devoted to a statement of the requisites for a valid habeas corpus petition. The plain meaning of the 1948 amendment is simply that a petition shall not be considered defective merely because it is signed and verified by someone other than "the person for whose relief it is intended."

The legislative history of the 1948 amendment reinforces this obvious conclusion. The Reviser's Note following 28 U.S.C.A. § 2242 reads:

> "Words 'or by some one acting in his behalf' were added. This follows the actual practice of the courts, as set forth in United States ex rel. Funaro v. Watchorn, CC. 1908, 164 F. 153; Collins v. Traeger, C.C.A. 1928, 27 F.2d 842, and cases cited."

The *Collins* and *Funaro* cases, of course, merely overruled objections to the sufficiency of habeas petitions, made on the ground that they were not signed and verified by the person whose release was sought. As one court put it, "often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained. . . ." *United States ex rel. Funaro v. Watchorn*, 164 Fed. 152, 153 (C.C.S.D.N.Y. 1908). The only apparent exception to this rule was that a petition by a "next friend" must state facts sufficient to "satisfy the court that the interest of the next friend is appropriate, and that there is good reason why the detained person does not himself sign and verify the complaint. . . ." *United*

States ex rel. Bryant v. Houston, 273 Fed. 915, 917 (2d Cir. 1921). Assuming that the 1948 amendment abrogated this latter requirement, a doubtful assumption in view of *Wilson v. Dixon*, 256 F.2d 536 (9th Cir.), *cert. denied*, 358 U.S. 856 (1958), it is clear that the amendment's sole effect is to insure that the validity of a petition will not be impaired by the fact that the person seeking relief did not personally sign and verify the same.

Only a strained construction of the statute could find that it confers a right, in contravention of a state prison regulation, in any person to sign and verify a petition on behalf of another, merely because a petition, so signed and verified, would not thereby be defective as a pleading. But no reasonable construction could lead to the conclusion that the statute also authorizes a prisoner to *prepare* a petition on behalf of another, in violation of an otherwise valid state regulation. We are at a loss to see how a statute prescribing the form of a pleading could be read as conferring any right to prepare a pleading. We therefore submit that it would be a gross perversion of congressional intent to construe 28 U.S.C. § 2242 as conferring a federally protected right in prisoners to give and receive assistance from one another in the preparation of habeas corpus pleadings, in contravention of an otherwise valid state prison regulation.

We may note also that petitioner has failed to demonstrate standing to raise his statutory claim. At most, the asserted right is alleged to apply only to the preparation of habeas corpus petitions addressed to federal courts. Petitioner admits, in his brief, that the record fails to show the nature of the documents he prepared for others

contrary to the rule for the violation of which he is incarcerated. It is possible, if not probable, that he prepared for other prisoners petitions for habeas corpus addressed to state courts, or pleadings in Civil Rights Act suits in federal courts, neither of which could be protected under any view of 28 U.S.C. § 2242. Thus, he has failed to show that his actions come within the claimed protection of the statute.

II

STATE OR FEDERAL CORRECTIONAL ADMINISTRATORS MAY PROPERLY PROHIBIT THE ACTIVITIES OF "JAILHOUSE LAWYERS"

The prison regulation which petitioner admittedly violated imposes a total prohibition on the giving or receiving, by prison inmates, of assistance on the part of other inmates in the preparation of legal documents. We believe that this regulation, and others like it, are valid as proper exercises of the broad discretion afforded correctional administrators to maintain prison discipline and protect the physical safety and the very lives of their charges. An outright prohibition on the activities of "jailhouse lawyers" is essential to the proper discharge of correctional administrators' responsibilities. The prisoner's constitutional right of access to the courts, as enunciated by this Court and the lower courts, is not impaired by this prohibition. Petitioner's apparent invitation to enlarge the scope of this right should be rejected, as a balancing of any conflicting interests between the state and the prisoner will weigh heavily in favor of the former, and thus justify the anti-"jailhouse lawyer" regulations. We will

further argue that an outright ban on prisoner assistance by other prisoners meets all of the objections raised by petitioner where, as in California, judicially-approved habeas corpus forms and staff assistance to inmates negate any claimed necessity for "jailhouse lawyers."

A. The Prisoner's Constitutional Right of Access to the Courts Does Not Include the Right to Receive Assistance from Other Prisoners in the Preparation of Legal Documents.

A prisoner's right of access to the courts means, essentially, the right to communicate freely with courts and attorneys. The right was originally declared by this Court in *Ex parte Hull,* 312 U.S. 546 (1941), to invalidate a prison rule permitting habeas corpus petitions to be mailed to courts only if, in the opinion of prison officials, they were properly drawn.

> "[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine," 312 U.S. at 546.

This Court has not elaborated on the nature of the right. However, a subsequent decision indicates that the right of access to the court contemplates only free communication. In *White v. Ragen,* 324 U.S. 760, 762 n.1 (1945), this Court stated:

> "It also has come to the attention of this Court that for some years the warden of the Illinois State Penitentiary, contrary to Ex parte Hull, 312 U.S. 546, denied the rights of prisoners to access to the courts unless they procured counsel to represent them. See

United States ex rel. Foley v. Ragen, D.C., 52 F.Supp. 265, Id. 7 Cir. 143 F.2d 774; United States ex rel. Bongiorno v. Ragen, D.C., 54 F.Supp. 973."

In both the *Foley* and *Bongiorno* cases, the denial of access consisted only of refusing to permit habeas corpus petitions to be sent out by prison inmates. Thus, this Court has certainly given no broader scope to the right than free communication.

We have found only one other judicial definition of the right:

> "In the context of this case, access to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

We have no quarrel with this definition. But the opportunities which prisons must afford the prisoner to engage in legal work are only those necessary for an inmate to do his own legal work and file his own legal documents. If an inmate is not interfered with in the preparation, filing, and service of legal documents, he is not denied "access to the courts" under any proper understanding of that term.

Should this Court, however, consider enlarging the scope of the right of access to the courts, we submit that such consideration entails a balancing of the legitimate

interests of the state with any competing interests of the prisoner. With respect to anti-"jailhouse lawyer" regulations, the interests of the state greatly outweigh those of the prisoner.

B. The State Has an Overriding Interest in Prohibiting the Activities of "Jailhouse Lawyers."

Prison officials have two primary reasons for promulgating rules forbidding the activities of "jailhouse lawyers," *i.e.*, inmates who prepare legal documents for others. First, the practice of "jailhouse law" results in the undermining of prison discipline to the point where the physical safety and even the very lives of prisoners are endangered. The librarian of the California State Prison at San Quentin describes the problem:

> "Jailhouse lawyers do a thriving business in San Quentin. Despite their frequent claims, inmates do not do favors for other inmates without some remuneration. Therefore, when one inmate spends his time and effort doing legal research for another, it is with the clear understanding that he will be paid. Payment can take any of the following forms: commissary goods, such as candy, cigarettes and food; clothing; or a homosexual relationship. Not all 'payments' are due at the prison. The 'understanding' may require some pay-off when the debtor-inmate is paroled or discharged, or he may be expected to arrange for payment while visiting with his family.
>
> Naturally, not all such agreements are honored. Breaches may occur when an inmate is paroled or discharged sooner than had been expected, or when he is transferred to another institution. When the agreement cannot be honored, fights involving several men may ensue. Upon several occasions, *we have*

> *been compelled to isolate 'clients' in solitary confinement to protect them from their 'jailhouse lawyers.'* Alternatively, more promises are made, time periods are extended, and interest is charged. Few men escape the creditor's tenacious claws. There have been threats of blackmail, made possible because the 'lawyer'-creditor knows all the facts of his debtor's case. Nor do the threats and violence occur only within the prison. *Both may extend to family and friends of the inmate who is unable to pay.*" H. Spector, *A Prison Librarian Looks at Writ-Writing,* 56 CALIF. L. REV. 365-66 (1968). (Emphasis added.)

The same article points out that "jailhouse lawyers" tend to monopolize the prison law library to the exclusion of other inmates, and impose serious hardships upon the librarian.

Clearly, the foregoing is enough to show that there is a legitimate state interest, as well as a legitimate social interest, in proscribing the activities of "jailhouse lawyers." There is, however, an additional factor, of perhaps equal importance, justifying the type of prison regulation herein under attack. "Jailhouse lawyers" demonstrably encourage the filing of fraudulent legal pleadings, to the detriment of the courts, society as a whole, and even the inmate "clients" themselves.

The perjurious proclivities of imprisoned felons are well known and have been judicially noticed. *See Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (concurring opinion of Circuit Judge Duniway). Perhaps little can be done to discourage prisoners from lying under oath, merely "in order to get themselves even the temporary

relief of a proceeding in court," *ibid.*, but no one would seriously argue that the tendency should be encouraged. Yet permitting the activities of "jailhouse lawyers" provides just such encouragement. For confirmation, we turn to the words of a long-time, highly articulate inmate of San Quentin:

> "The last type of writ-writer to be discussed writes writs for economic gain. This group is comprised of a few unscrupulous manipulators who are interested only in acquiring from other prisoners money, cigarettes, or merchandise purchased in the inmate canteen. Once they have a 'client's' interest aroused and determine his ability to pay, they must keep him on the 'hook.' *This is commonly done by deliberately misstating the facts of his case so that it appears, at least on the surface, that the inmate is entitled to relief.* The documents drafted for the client cast the writ-writer in the role of a sympathetic protagonist. After reading them, the inmate is elated that he has found someone able to present his case favorably. He is willing to pay to *maintain the lie that has been created for him.* After years of futilely applying to the court for various writs, *he will leave prison certain that he has not been accorded justice.*" C. Larsen, *A Prisoner Looks at Writ-Writing,* 56 CALIF. L. REV. 343, 348-49 (1968). (Emphasis added.)

Further confirmation, if any be needed, of the "jailhouse lawyer's" tendency to perjury and abuse of process is found in *Allison v. Wilson,* 277 F. Supp. 271 (N.D. Cal. 1967), where the court found that the plaintiff was "engaged in a patently vindictive scheme to harass and annoy law enforcement officials with frivolous and malicious suits and that the suit herein is a part of that

scheme." *Id.* at 275. Plaintiff was a state prisoner. Correctional officers, during a routine patrol, "discovered the following sign attached to the bunk of the cell in which plaintiff was the sole occupant:

> "'ATTORNEY AT LAW, CIVIL COMPLAINTS, WRITS, ETC. OFFICE HOURS 8:00 to 4:00.'" *Id.* at 272.

Thus, "jailhouse lawyers" encourage the filing of fraudulent litigation, clogging the courts with perjured pleadings, and forcing unnecessary evidentiary hearings. Worse, perhaps, they interfere with the rehabilitative process by persuading their inmate "clients" that they have been denied justice, undoubtedly embittering the deceived inmates against the law, the courts, and society in general. Their suppression is clearly an exercise of a legitimate state interest.

While the root of the evil of "jailhouse lawyering" is clearly in the payment of compensation, it is incredibly naive to assert that the answer lies in prohibiting such compensation. Such a prohibition would be totally unenforceable. Correctional officers are able presently to enforce the regulations proscribing legal assistance by inmates only by catching a prisoner in the possession of legal papers pertaining to the case of another inmate. Compensation agreements are not commonly reduced to writing, and payment itself takes place outside the gaze of correctional officers. Payment could not be proved without the testimony of either the "lawyer" or his "client." While the physical evidence of possession of another inmate's legal papers is sufficient proof of violation of existing regulations, it would obviously not prove viola-

tion of regulations permitting inmate legal assistance but proscribing compensation for such assistance. Therefore, such regulations could not be enforced, and the effect of their enactment would be to allow "jailhouse lawyers," with all the evils they bring, to flourish unhampered.

C. Prison Inmates Have Only a Limited Interest in Receiving Assistance from Non-lawyers in the Preparation of Legal Pleadings.

The interest of a prisoner in receiving, in the preparation of habeas corpus petitions and Civil Rights Act suits, assistance from non-lawyers, particularly fellow prisoners, is, we submit, limited indeed. As petitioner concedes, "a proper petition for habeas corpus is only a clear and simple statement of the facts which merit relief; thus, an *acceptable* petition can be prepared by a person with a minimum of legal knowledge." *Accord, Hatfield v. Bailleaux, supra,* 290 F.2d at 640 & n.18. The District Court in the instant case agreed. See Petition, Appendix B 17. Civil Rights Act pleadings, like pleadings generally, are, of course, also properly factual in character. Therefore, if a prisoner is physically able to write, he is able to prepare a proper habeas corpus petition or Civil Rights Act complaint regardless of the extent of his legal knowledge.

For that matter, a habeas corpus petitioner's ignorance of the law may even be helpful. Clarence Earl Gideon believed and maintained at all times that he had a constitutional right to appointed counsel to represent him at trial. *See* A. Lewis, Gideon's Trumpet (1964). A knowledgeable "jailhouse lawyer" might have told him,

correctly, that he was wrong. But by persisting in his erroneous belief, he vindicated his claim. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

We have previously shown the unconscionable exploitation of inmates by "jailhouse lawyers." The latter's limited knowledge of the law is not likely to be helpful to their fellow prisoners, and may even jeopardize the vindication of a valid claim. As the Court of Appeals found,

> "[N]o favor is granted to the other prisoners by allowing them representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the bar. It takes little imagination to recognize possibilities of conflict of interest in allowing one who is a convicted murderer, rapist or burglar, serving a long sentence, to represent prisoners who have possible meritorious claims." Petition, Appendix B 21.

We submit that any value derived by prisoners from the practice of "jailhouse law" is clearly outweighed by the legitimate and urgent need of correctional administrators to prevent the practice.

D. Any Competing Interests of Sound Prison Administration and Individual Prisoners Are Reconciled by the California Procedure.

We have argued that the prison regulation at issue is valid on its face. We believe that the pernicious effects of "jailhouse lawyers" justify their prohibition regardless of that prohibition's effect upon other inmates. We recognize, however, that a counter-argument can be made—that prisoners who are physically unable to write, or who have no conception of how to frame an acceptable habeas corpus petition, may be unable to have their claims adjudicated without some assistance from other prisoners. We will submit that California has provided for this contingency in a manner which fully protects the constitutional rights of prisoners.

Commentators seem to be in agreement that the "jailhouse lawyer" is not the answer to the prisoner's problem. His incompetence, and the evils flowing from his activities, are disquieting even to those most sympathetic to prison inmates. *See generally Prison Writ-Writing: Three Essays,* 56 CALIF. L. REV. 342 (1968); Note, 19 STAN. L. REV. 887 (1967). These same commentators seem to assume, however, as did the District Court in the instant case, that the only alternative to "jailhouse lawyers" is the appointment of counsel for every prisoner desiring to institute legal action regarding his confinement. This alternative is obviously impracticable.

> "It is increasingly difficult to provide appointive counsel for those individuals whose petitions require an evidentiary hearing, and it would be virtually impossible to provide each prisoner who wished to file a petition with individual counsel." *Coonts v. Wainwright,* 2 Crim. L. Rptr. 2495 (M.D. Fla. 1968).

We do not agree that prison officials must be faced with either allowing the evils of "jailhouse-lawyering" to flourish in their prisons, or undertaking the impossible task of furnishing every inmate with a qualified attorney to act as his personal legal advisor.[1] A third, fully satisfactory alternative is afforded by the courts and correctional administrators of California.

All California state and federal district courts have by rule of court adopted forms to be filled in by persons seeking habeas corpus relief. Copies of these forms will be lodged with this Court, and furnished to counsel, concurrently with the filing of this brief. As the Court will see upon examination of these forms, they are designed to elicit, with probing questions, all facts necessary for the petitioned court to determine whether a prima facie case for habeas corpus relief has been stated. These facts include the name of petitioner's custodian, the place where he is being held in custody, the date, time, and case number of the conviction or convictions attacked, the history of his representation with respect to such convictions, the nature of the plea entered, whether an appeal was taken and, if so, citations to any published opinion, the facts

[1]We will not respond to petitioner's contention that this Court should recognize a constitutional right in prisoners to appointed counsel to prepare habeas corpus petitions. This contention was not raised in the courts below and was not presented in the Petition. Thus, it is not properly before this Court. Moreover, petitioner lacks standing to raise the claim. He fails to state that he has ever requested and been denied counsel. Rather, he asserts the right to act as counsel for other prisoners. If they have a right to appointed counsel, petitioner's basis for attacking the anti-"jailhouse-lawyer" regulation—that it withdraws needed assistance from inmates incapable of conducting their own litigation unaided—collapses. Thus, the assertion of a right to counsel is antithetical to petitioner's claim.

upon which the claim for relief is based, and the courts, if any, to which the claim has been previously presented. Mimeographed copies of these forms are made available without charge to all California state prisoners.

These forms guide the prisoner over any procedural rocks and shoals which could prevent relief, and provide for a clear and concise statement of the facts forming the basis for his claim. While petitioners frequently append arguments of law to the form petitions, federal district courts have discretion to disregard legal arguments not appearing on the forms. *Hooker v. United States District Court, Central District of California,* 380 F.2d 5 (9th Cir. 1967). Thus, preparation of a habeas corpus petition in California is a matter of filling out a form; even an inmate who does not comprehend the nature of habeas corpus can do this. A "jailhouse lawyer" is not needed, and his "legal arguments" may even be disregarded.

The problem of the illiterate prisoner is also considered and solved in California. Regulations of the Director of Corrections provide that staff members shall provide necessary assistance in filling out the habeas corpus forms to those inmates physically unable to do so. *See* California Department of Corrections Administrative Manual ¶ 330.07. The only objection to this practice we have heard voiced is the claim that conflicts of interest could arise when a prison guard is asked to help prepare a petition alleging maltreatment. *See* Note, 19 STAN. L. REV. 887, 890 (1967). However, in such cases, the requisite staff assistance to an illiterate inmate could be provided by a trusted person such as a chaplain. And, in any

event, the conflicts of interest between a "jailhouse lawyer" and his inmate "client" have been demonstrated above, and need no further explication.

Petitioner would seem to concede the constitutionality of the California practice. As he presents the question, it relates to the validity of "a state prison regulation which prohibits a prison inmate from assisting a fellow inmate in preparing petitions for writs of habeas corpus and other legal papers, *when no other help is available . . .*" (Emphasis added.) He further states that the claimed fault of the Tennessee regulation is that it may block access to the courts on the part of prisoners who are "incapable of preparing an intelligible petition without assistance of some kind." And in challenging the conclusion of the Court of Appeals that his activities constitute the unlawful practice of law, petitioner says: "At most such assistance is clerical and the person assisting is not practicing law but is acting as a lay intermediary." If petitioner's activities consist merely of filling in forms at the direction of illiterate inmates, or acting as their stenographer, he may be correct. In that case, however, his activities could not possibly be justified if staff assistance were provided for illiterate or physically handicapped prisoners. On the other hand, if he undertakes a review of the facts of other inmates' cases and formulates legal arguments on their behalf, he is engaged in the practice of law under any definition.

We submit that the unauthorized practice of law is subject to state regulation. The state has the right to prevent the filing of false and frivolous claims by persons, acting as attorneys, who are not subject to the ethics and

discipline of the bar. As this Court has indicated, the state's right of regulation is not absolute. *See United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n,* 88 S.Ct. 353 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *NAACP v. Button,* 371 U.S. 415 (1963). But a legitimate state interest in the regulation will be recognized and honored:

> "[A]lthough the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed." *Id.* at 444.

We submit that the implied test articulated above for determining the right of the state to regulate the practice of law within its borders is amply met in the instant case by the showing we have made of "substantive evils flowing from petitioner's activities." Any possible claim of countervailing individual interest in "jailhouse lawyering" is negated at least where, as in California, judicially-approved habeas corpus forms and the furnishing of staff assistance in filling them out obviate any need for inmate assistance in violation of correctional regulations.

CONCLUSION

This Court should uphold the prison rules here under attack as a proper exercise of the necessarily broad powers of correctional administrators to maintain prison discipline and protect the inmates in their charge. But if this Court should find any constitutional infirmity in the Tennessee regulations, this Court should hold that such infirmity could be removed by providing for judicially-approved habeas-corpus forms and staff assistance in filling them out, as California has done.

Dated, San Francisco, California,
May 17, 1968.

Respectfully submitted,

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